MC0352

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Agreement for the appointment of Clerks of Works for construction projects in the NHS (1996 Edition)

Amendment No 2

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included in the conditions of appointment of the sub-contractor a term which requires that payment be made to the sub-contractor within a period not exceeding 30 days from receipt of a fee account by the clerk of works from the sub-contractor.

3.24 Not later than 5 days after the date on which a payment becomes due, or would have become due if:

a. the other party had carried out his obligations under the contract; and

b. no set off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts;

the paying party shall specify the amount (if any) of the payment made or proposed to be made and the basis on which that amount was calculated.

3.25 No amounts shall be withheld for payment after the final date for payment of any sum due under this agreement unless notice of intention to withhold payment in accordance with clause 3.24 has been given. Such notice must be given not later than the period set out in clause 3.22.

3.26 If any sum due to the clerk of works is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the clerk of works may (without prejudice to any other right or remedy) suspend performance of his obligations under this agreement, provided that 7 days notice so to do and setting out the grounds on which it is intended to suspend performance has been given.

3.27 The right to suspend performance in 3.25 and 3.26 above ceases when the client makes payment in full of the amount due.

3.28 Any period during which performance is suspended in pursuance of clauses 3.25 and 3.26 above shall be disregarded in computing for the purposes of any contractual time limit, the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Value Added Tax – in relation to fees and expenses

3.29 All fees and expenses set out in this agreement are exclusive of Value Added Tax, the amount of which, at the rate and in the manner prescribed by law, shall be paid by the client to the clerk of works.

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4.0 Specimen certificates

This part contains specimens of the certificates referred to in the agreement that are required to be signed by the clerk of works:

- 4.1 – insurer's certificate of professional indemnity insurance
- 4.2 – construction certificate by clerk of works.

Clerk of works – hourly rates

c. Clerk of works' staff time shall be reimbursed at the rate per hour quoted by the clerk of works in articles 6.6i(b) and 6.6ii(b) of the memorandum of agreement in the categories stated or such other rate as may be agreed between the client and the clerk of works. The rate per hour quoted shall apply until the completion of the duties set out in schedule 1 of the memorandum of agreement. The rate per hour shall include salary, payroll and other costs of employment. Only expenses for travelling and subsistence shall be chargeable in accordance with clause 3.10 in addition to the hourly rates quoted.

Travelling time

d. Time spent by directors, senior clerks of works and clerks of works on travelling in connection with the duties set out in schedule 1 of the memorandum of agreement shall be chargeable on the above basis, excluding travelling time between home and the normal work place.

Supervisory duties

e. The supervisory duties of a director or senior clerk of works shall be deemed to be included in the rate per hour quoted by the clerk of works in articles 6.6i(b) and 6.ii(b) of the memorandum of agreement.

Secretarial and administrative staff

3.6 Time charge rates shall include the cost of providing secretarial staff or staff engaged on general accountancy or administration duties.

Clerk of works' records

3.7 The clerk of works shall maintain records of time spent on services performed on a time charge basis. The clerk of works shall make such records available to the client upon reasonable request.

Travelling, subsistence and other expenses

3.8 Travelling, subsistence and other expenses shall be included in the lump sum fees and shall be deemed to include the cost of:

a. telex, facsimile and telephone calls;

b. postage and similar delivery charges;

c. travelling, hotel expenses and other similar expenses;

d. all printing, reproduction and purchase of all documentation, drawings, maps, photographs, manuals needed by the clerk of works and other members of the design team insofar as they are produced by the clerk of works for the proper performance of the duties relating to this particular commission including the numbers stated in clause 1.12 of the scheme particulars.

Additional expenses

3.9 The clerk of works shall be reimbursed for all expenses properly incurred in connection with any disbursements required by the client.

Travelling, subsistence and other expenses – time based charges or where not included in lump sum fee bid

3.10 For time based charges and where the items at clause 3.8 are not included in the lump sum fee recorded in article 6.5 of the memorandum of agreement then the clerk of works shall be reimbursed in respect of travelling, subsistence and other expenses properly made at net cost. Where these services are carried out within the clerk of works office, they shall be reimbursed at rates to be agreed between the clerk of works and the client, taking into account commercial rates for similar services available on the open market. Travelling and subsistence shall be reimbursed at actual costs, up to the maximum rate applicable to staff in the National Health Service of equivalent status, and subject to the same conditions.

Site accommodation

Payment for site accommodation and equipment

3.11 The client shall be responsible for the provision of site accommodation for the clerk of works provided that the client agrees that the clerk of works' staff are necessarily employed on site or on the client's premises for site inspection purposes. All accommodation and equipment will be as detailed in the contract documents for the appointment of the contractor.

Changes

Post-contract changes (work stage 4 onwards)

3.12 Where the works are varied by the client, post-contract fees and expenses for the clerk of works' services in connection with such variations shall be negotiated between the client and the clerk of works to produce an agreed lump sum, or in accordance with the scale of charges as described in clause 3.5.

Extra work and expense

3.13 Where the clerk of works is involved in extra work and expense for reasons beyond the clerk of works' control and other than is provided for under clause 3.15 additional fees shall be due, and shall be an agreed lump sum or in accordance with the scale of charges as described in clause 3.5.

Payment for additional duties

Fees for additional duties required by the client

3.14 For additional duties not normally necessary such as those in connection with contractor's claims and all similar duties where the client specifically instructs the clerk of works in writing, the charges shall either be an agreed lump sum or in accordance with the scale of charges as described in clause 3.5.

Statutory fees

Payment of statutory fees

3.15 The client shall pay all fees in respect of applications under planning and other statutory requirements.

Suspension, resumption and termination

Fees on suspension or termination

3.16 Save where paragraph 3.19 below applies, on suspension or termination of the clerk of works appointment under clauses 2.31, 2.33 or 2.34 the clerk of works shall be entitled to fees due for all work completed at the date of suspension or termination.

Reimbursement during suspension

3.17 During any period of suspension the clerk of works shall be reimbursed by the client for costs necessarily incurred under the appointment up to the date of resumption or termination.

Fees on resumption

3.18 On resumption within six months of suspension, previous payments shall be regarded as payments on account towards the total fee. The fee may be adjusted as a result of negotiation between the project director and the clerk of works to allow for any cost increases or decreases that have occurred during the period of suspension. Any adjustment shall be an agreed lump sum together with an adjustment to the scale of charges as described in clause 3.8 .

Reimbursement on termination by the client

3.19 Where the clerk of works appointment is terminated or suspended by the client under clause 2.31, for the reasons set out in clause 2.31(b) or 2.31(c), or terminated following a suspension for these reasons, the consultant shall be reimbursed by the client for costs, excluding loss of profit, necessarily incurred in connection with work up to the date of termination or arising as a result of the termination, save that the clerk of works shall have no intent to claim costs incurred in connection with work which is the subject of a dispute between the client and the clerk of works until the dispute has been resolved.

Reimbursement on termination by the clerk of works

3.20 Where the clerk of works terminates the appointment under clause 2.34, the client shall be responsible for costs necessarily incurred by the clerk of works arising as a result of the termination.

Payment of accounts

Submission of accounts and documentary evidence

3.21 Accounts for payment of fees and/or expenses and disbursements shall be submitted to the client at the intervals stated in article 6.8 of the memorandum of agreement. Interim payments of fees shall be proportionate to the extent to which the commissioned duties have been discharged. Accounts for time-charge based duties and/or travelling, subsistence and other expenses shall be accompanied by documentary evidence of the time and expenses incurred. Such time charges and/or travelling, subsistence and other expenses shall be in respect of the whole of the period since the preceding interim payment.

Payment of accounts

3.22 All sums due from the client to the clerk of works under the agreement shall be paid within 30 days of submission by the clerk of works of his/her account to the project director, save where there is a bona fide dispute between the clerk of works and the client as to the sum due in respect of work carried out by the clerk of works, in which case the client shall not be liable to make payment until the dispute has been resolved.

3.23 Where the clerk of works sub-contracts any of the duties forming part of this agreement, there shall be

2.46 If the parties have not chosen a new adjudicator jointly within the 28 days of the adjudicator resigning or becoming unable to act, then the President of the Chartered Institute of Arbitrators shall be requested to nominate a new adjudicator.

Arbitration

2.47 If the following arises:

a. the adjudicator fails to provide his decision within the period specified in clause 2.40; or

b. the client and/or the clerk of works disagree with the decision of the adjudicator and the duties under the commission have been completed;

Client's licence and restrictions

2.20 The client shall have a licence to copy and use any documents provided by the clerk of works for information to facilitate the future extension, alteration, maintenance or repair of the works. The client, upon payment or tender of any fees due, shall have a licence to copy any documents for any purpose agreed between the client and clerk of works related to the extension, alteration, maintenance or repair of the works. The clerk of works shall not be liable for any such use by the client or its appointee of any drawings or other documents for any purpose other than that for which the same were prepared and provided by the clerk of works. Save as aforesaid the client shall not make copies of any documents nor shall he use the same in connection with the making or improvement of any works other than those comprising the Works without the prior approval of the clerk of works which approval shall not be unreasonably withheld, and upon such terms as may be agreed between the client and clerk of works.

Clerk of works' rights of publication

2.21 The clerk of works shall not communicate with the media or any outside body or publish or display alone or in conjunction with any other person, any articles, photographs or other illustrations relating to the Works without prior written consent from the client, which consent shall not be unreasonably withheld.

Professional indemnity insurance

Extent of insurance cover

2.22 The clerk of works shall take out and maintain throughout the period from the date of commencement of his services under this commission professional indemnity insurance in respect of the clerk of works' business generally. The professional indemnity insurance shall be maintained until the expiration of six/twelve years*, provided that it can be obtained at reasonable market rates, from the date of completion of his commission. The level of indemnity shall be as shown in the certificate set out in part 4 of this agreement.

Professional indemnity insurance certificate

2.23 The clerk of works shall, whenever required by the client, produce a certificate, in the form set out in part 4 of this agreement, signed by or on behalf of the insurers.

* Client to delete alternative not required

Certification

Certification generally

2.24 The clerk of works shall provide the client with completed certificates when required to do so.

Specimen certificates

2.25 The clerk of works shall ensure that the certificates included in part 4 of this agreement are provided when required in the plan of work in schedule 1 of the memorandum of agreement.

Assignment and sub-contracting

Assignment by the clerk of works

2.26 The clerk of works shall not assign the whole or part of the benefits or in any way transfer the obligations of this agreement or any part thereof without the consent of the client.

Assignment by the client

2.27 The client reserves the right to assign the whole or any part of the benefit or transfer obligations of the agreement or any part thereof to another NHS body without the consent of the clerk of works.

Sub-contracting

2.28 The clerk of works shall not sub-contract any of the duties under this agreement without the consent of the client.

Variation, extension, suspension or termination

Variation or extension by the client

2.29 The client may vary or extend in time the whole or part of the agreed duties by giving reasonable notice in writing to the clerk of works. In such notice the project director shall specify the duties affected.

Suspension or termination by the client

2.30 The client may suspend or terminate the whole or part of the agreed duties by giving reasonable notice in writing to the clerk of works. In such notice the client

shall specify the duties affected and the reason for suspension or termination.

2.31 Suspension or termination by the client shall be permitted in the following circumstances:

a. the client has decided to suspend or terminate the scheme;

b. non-performance by the clerk of works;

c. breach of the provisions of this agreement by the clerk of works;

d. the clerk of works becoming bankrupt or insolvent.

Resumption of duties

2.32 If the clerk of works has not been given instructions to resume any work suspended under clauses 2.30 and 2.31a within six months from the date of suspension, the clerk of works may make a written request for such instructions, which must be given in writing. If these have not been received within 30 days of the date of such request, the clerk of works shall have the right to treat the appointment as terminated.

Suspension or termination by the clerk of works

2.33 The clerk of works may suspend or terminate the performance of the agreed duties on the expiry of reasonable notice given in writing to the client. In such notice the clerk of works shall specify the duties affected and the reason for suspension or termination.

2.34 Suspension or termination by the clerk of works shall be permitted in the following circumstances:

a. the client has not provided an instruction to resume work under clause 2.30;

b. breach of the provisions of this agreement by the client.

Death or incapacity of the clerk of works' key personnel

2.35 Should the clerk of works through death or incapacity be unable to perform the agreed duties, the clerk of works will make all reasonable efforts to replace the key personnel with other suitably qualified staff. In the event he is unable to do so, this agreement shall thereby be terminated.

Delivery of documents

2.36 On termination of the agreement and on satisfactory delivery of all documentation prepared by the clerk of works to the client, the clerk of works shall be paid all due fees and expenses.

Settlement of disputes

Adjudication

2.37 If a dispute arises under this agreement, either party may give notice at any time of his intention to refer the dispute to adjudication. Such a notice shall be served within 28 days of either party being made aware of the dispute. The notice shall require the adjudicator to state within seven days whether he is willing to act in connection with the resolution of the dispute. The adjudicator must indicate within seven days of the receipt of the notice whether he is willing to act and shall give details of any specific matters in relation to which he requires evidence or in relation to which he requires either party to prepare written submissions.

2.38 The notice shall specify the matter in dispute and set out the principal facts and arguments relating to it. Copies of all relevant documentation shall be attached to the notice.

2.39 The party to whom a copy of the notice required under clause 2.37 has been sent, shall send representations to the adjudicator within 14 days of his appointment. Copies of the relevant documentation shall be attached to the notice.

2.40 The adjudicator shall act impartially. He may take such steps as he deems necessary to ascertain the facts relating to the dispute and the law. He shall reach his decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. He may himself extend the period of 28 days by up to 14 days, with the consent of the party to whom the dispute was referred.

2.41 The decision of the adjudicator shall be binding until the dispute is finally determined in accordance with clause 2.47 or by agreement.

2.42 The adjudicator, his employee or agent shall not be liable to the parties for breach of anything done or omitted in the discharge or purported discharge of those functions as adjudicator unless the act or omission is in bad faith.

2.43 Payment of the adjudicator's fees shall be shared equally between the parties.

2.44 During the process of adjudication, the performance of the agreed duties shall continue as if there were no difference or dispute.

2.45 If the adjudicator named in article 6.9 of the memorandum of agreement resigns or is unable to act, the parties shall choose a new adjudicator jointly.

included in the conditions of appointment of the sub-contractor a term which requires that payment be made to the sub-contractor within a period not exceeding 30 days from receipt of a fee account by the clerk of works from the sub-contractor.

3.24 Not later than 5 days after the date on which a payment becomes due, or would have become due if:

a. the other party had carried out his obligations under the contract; and

b. no set off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts;

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3.28 Any period during which performance is suspended in pursuance of clauses 3.25 and 3.26 above shall be disregarded in computing for the purposes of any contractual time limit, the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

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Clerk of works – hourly rates

c. Clerk of works' staff time shall be reimbursed at the rate per hour quoted by the clerk of works in articles 6.6i(b) and 6.6ii(b) of the memorandum of agreement in the categories stated or such other rate as may be agreed between the client and the clerk of works. The rate per hour quoted shall apply until the completion of the duties set out in schedule 1 of the memorandum of agreement. The rate per hour shall include salary, payroll and other costs of employment. Only expenses for travelling and subsistence shall be chargeable in accordance with clause 3.10 in addition to the hourly rates quoted.

Travelling time

d. Time spent by directors, senior clerks of works and clerks of works on travelling in connection with the duties set out in schedule 1 of the memorandum of agreement shall be chargeable on the above basis, excluding travelling time between home and the normal work place.

Supervisory duties

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b. postage and similar delivery charges;

c. travelling, hotel expenses and other similar expenses;

d. all printing, reproduction and purchase of all documentation, drawings, maps, photographs, manuals needed by the clerk of works and other members of the design team insofar as they are produced by the clerk of works for the proper performance of the duties relating to this particular commission including the numbers stated in clause 1.12 of the scheme particulars.

Additional expenses

3.9 The clerk of works shall be reimbursed for all expenses properly incurred in connection with any disbursements required by the client.

Travelling, subsistence and other expenses – time based charges or where not included in lump sum fee bid

3.10 For time based charges and where the items at clause 3.8 are not included in the lump sum fee recorded in article 6.5 of the memorandum of agreement then the clerk of works shall be reimbursed in respect of travelling, subsistence and other expenses properly made at net cost. Where these services are carried out within the clerk of works office, they shall be reimbursed at rates to be agreed between the clerk of works and the client, taking into account commercial rates for similar services available on the open market. Travelling and subsistence shall be reimbursed at actual costs, up to the maximum rate applicable to staff in the National Health Service of equivalent status, and subject to the same conditions.

Site accommodation

Payment for site accommodation and equipment

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Changes

Post-contract changes (work stage 4 onwards)

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Statutory fees

Payment of statutory fees

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Suspension, resumption and termination

Fees on suspension or termination

3.16 Save where paragraph 3.19 below applies, on suspension or termination of the clerk of works appointment under clauses 2.31, 2.33 or 2.34 the clerk of works shall be entitled to fees due for all work completed at the date of suspension or termination.

Reimbursement during suspension

3.17 During any period of suspension the clerk of works shall be reimbursed by the client for costs necessarily incurred under the appointment up to the date of resumption or termination.

Fees on resumption

3.18 On resumption within six months of suspension, previous payments shall be regarded as payments on account towards the total fee. The fee may be adjusted as a result of negotiation between the project director and the clerk of works to allow for any cost increases or decreases that have occurred during the period of suspension. Any adjustment shall be an agreed lump sum together with an adjustment to the scale of charges as described in clause 3.8 .

Reimbursement on termination by the client

3.19 Where the clerk of works appointment is terminated or suspended by the client under clause 2.31, for the reasons set out in clause 2.31(b) or 2.31(c), or terminated following a suspension for these reasons, the consultant shall be reimbursed by the client for costs, excluding loss of profit, necessarily incurred in connection with work up to the date of termination or arising as a result of the termination, save that the clerk of works shall have no intent to claim costs incurred in connection with work which is the subject of a dispute between the client and the clerk of works until the dispute has been resolved.

Reimbursement on termination by the clerk of works

3.20 Where the clerk of works terminates the appointment under clause 2.34, the client shall be responsible for costs necessarily incurred by the clerk of works arising as a result of the termination.

Payment of accounts

Submission of accounts and documentary evidence

3.21 Accounts for payment of fees and/or expenses and disbursements shall be submitted to the client at the intervals stated in article 6.8 of the memorandum of agreement. Interim payments of fees shall be proportionate to the extent to which the commissioned duties have been discharged. Accounts for time-charge based duties and/or travelling, subsistence and other expenses shall be accompanied by documentary evidence of the time and expenses incurred. Such time charges and/or travelling, subsistence and other expenses shall be in respect of the whole of the period since the preceding interim payment.

Payment of accounts

3.22 All sums due from the client to the clerk of works under the agreement shall be paid within 30 days of submission by the clerk of works of his/her account to the project director, save where there is a bona fide dispute between the clerk of works and the client as to the sum due in respect of work carried out by the clerk of works, in which case the client shall not be liable to make payment until the dispute has been resolved.

3.23 Where the clerk of works sub-contracts any of the duties forming part of this agreement, there shall be

Client's licence and restrictions

2.20 The client shall have a licence to copy and use any documents provided by the clerk of works for information to facilitate the future extension, alteration, maintenance or repair of the works. The client, upon payment or tender of any fees due, shall have a licence to copy any documents for any purpose agreed between the client and clerk of works related to the extension, alteration, maintenance or repair of the works. The clerk of works shall not be liable for any such use by the client or its appointee of any drawings or other documents for any purpose other than that for which the same were prepared and provided by the clerk of works. Save as aforesaid the client shall not make copies of any documents nor shall he use the same in connection with the making or improvement of any works other than those comprising the Works without the prior approval of the clerk of works which approval shall not be unreasonably withheld, and upon such terms as may be agreed between the client and clerk of works.

Clerk of works' rights of publication

2.21 The clerk of works shall not communicate with the media or any outside body or publish or display alone or in conjunction with any other person, any articles, photographs or other illustrations relating to the Works without prior written consent from the client, which consent shall not be unreasonably withheld.

Professional indemnity insurance

Extent of insurance cover

2.22 The clerk of works shall take out and maintain throughout the period from the date of commencement of his services under this commission professional indemnity insurance in respect of the clerk of works' business generally. The professional indemnity insurance shall be maintained until the expiration of six/twelve years*, provided that it can be obtained at reasonable market rates, from the date of completion of his commission. The level of indemnity shall be as shown in the certificate set out in part 4 of this agreement.

Professional indemnity insurance certificate

2.23 The clerk of works shall, whenever required by the client, produce a certificate, in the form set out in part 4 of this agreement, signed by or on behalf of the insurers.

* Client to delete alternative not required

Certification

Certification generally

2.24 The clerk of works shall provide the client with completed certificates when required to do so.

Specimen certificates

2.25 The clerk of works shall ensure that the certificates included in part 4 of this agreement are provided when required in the plan of work in schedule 1 of the memorandum of agreement.

Assignment and sub-contracting

Assignment by the clerk of works

2.26 The clerk of works shall not assign the whole or part of the benefits or in any way transfer the obligations of this agreement or any part thereof without the consent of the client.

Assignment by the client

2.27 The client reserves the right to assign the whole or any part of the benefit or transfer obligations of the agreement or any part thereof to another NHS body without the consent of the clerk of works.

Sub-contracting

2.28 The clerk of works shall not sub-contract any of the duties under this agreement without the consent of the client.

Variation, extension, suspension or termination

Variation or extension by the client

2.29 The client may vary or extend in time the whole or part of the agreed duties by giving reasonable notice in writing to the clerk of works. In such notice the project director shall specify the duties affected.

Suspension or termination by the client

2.30 The client may suspend or terminate the whole or part of the agreed duties by giving reasonable notice in writing to the clerk of works. In such notice the client

shall specify the duties affected and the reason for suspension or termination.

2.31 Suspension or termination by the client shall be permitted in the following circumstances:

a. the client has decided to suspend or terminate the scheme;

b. non-performance by the clerk of works;

c. breach of the provisions of this agreement by the clerk of works;

d. the clerk of works becoming bankrupt or insolvent.

Resumption of duties

2.32 If the clerk of works has not been given instructions to resume any work suspended under clauses 2.30 and 2.31a within six months from the date of suspension, the clerk of works may make a written request for such instructions, which must be given in writing. If these have not been received within 30 days of the date of such request, the clerk of works shall have the right to treat the appointment as terminated.

Suspension or termination by the clerk of works

2.33 The clerk of works may suspend or terminate the performance of the agreed duties on the expiry of reasonable notice given in writing to the client. In such notice the clerk of works shall specify the duties affected and the reason for suspension or termination.

2.34 Suspension or termination by the clerk of works shall be permitted in the following circumstances:

a. the client has not provided an instruction to resume work under clause 2.30;

b. breach of the provisions of this agreement by the client.

Death or incapacity of the clerk of works' key personnel

2.35 Should the clerk of works through death or incapacity be unable to perform the agreed duties, the clerk of works will make all reasonable efforts to replace the key personnel with other suitably qualified staff. In the event he is unable to do so, this agreement shall thereby be terminated.

Delivery of documents

2.36 On termination of the agreement and on satisfactory delivery of all documentation prepared by the clerk of works to the client, the clerk of works shall be paid all due fees and expenses.

Settlement of disputes

Adjudication

2.37 If a dispute arises under this agreement, either party may give notice at any time of his intention to refer the dispute to adjudication. Such a notice shall be served within 28 days of either party being made aware of the dispute. The notice shall require the adjudicator to state within seven days whether he is willing to act in connection with the resolution of the dispute. The adjudicator must indicate within seven days of the receipt of the notice whether he is willing to act and shall give details of any specific matters in relation to which he requires evidence or in relation to which he requires either party to prepare written submissions.

2.38 The notice shall specify the matter in dispute and set out the principal facts and arguments relating to it. Copies of all relevant documentation shall be attached to the notice.

2.39 The party to whom a copy of the notice required under clause 2.37 has been sent, shall send representations to the adjudicator within 14 days of his appointment. Copies of the relevant documentation shall be attached to the notice.

2.40 The adjudicator shall act impartially. He may take such steps as he deems necessary to ascertain the facts relating to the dispute and the law. He shall reach his decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. He may himself extend the period of 28 days by up to 14 days, with the consent of the party to whom the dispute was referred.

2.41 The decision of the adjudicator shall be binding until the dispute is finally determined in accordance with clause 2.47 or by agreement.

2.42 The adjudicator, his employee or agent shall not be liable to the parties for breach of anything done or omitted in the discharge or purported discharge of those functions as adjudicator unless the act or omission is in bad faith.

2.43 Payment of the adjudicator's fees shall be shared equally between the parties.

2.44 During the process of adjudication, the performance of the agreed duties shall continue as if there were no difference or dispute.

2.45 If the adjudicator named in article 6.9 of the memorandum of agreement resigns or is unable to act, the parties shall choose a new adjudicator jointly.

2.46 If the parties have not chosen a new adjudicator jointly within the 28 days of the adjudicator resigning or becoming unable to act, then the President of the Chartered Institute of Arbitrators shall be requested to nominate a new adjudicator.

Arbitration

2.47 If the following arises:

a. the adjudicator fails to provide his decision within the period specified in clause 2.40; or

b. the client and/or the clerk of works disagree with the decision of the adjudicator and the duties under the commission have been completed;